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No. 82-539

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FIBERGLASS SPECIALTY COMPANY, INC.,
Petitioner,

v.

BOR-SON CONSTRUCTION, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Did the bankruptcy court have jurisdiction under the Bankruptcy Act of 1898 to adjudicate the respective rights of a bankrupt subcontractor and a general contractor over money retained by the general contractor under their subcontract agreement?

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APPLICABLE STATUTORY PROVISION

United States Supreme Court Rule 17

Rule 17. Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The undersigned respondent respectfully requests the Court to deny the Petition for a Writ of Certiorari to review the judgment, entered June 21, 1982, in the United States Court of Appeals for the Eighth Circuit.

STATEMENT OF THE CASE

The dispute involved in this case arose from a construction subcontract entered into on June 29, 1979, by Bor-Son Construction, Inc. ("Bor-Son") as contractor and Fiberglass Specialty Company, Inc. ("Fiberglass") as subcontractor. Fiberglass agreed to furnish all labor, material, skill and equipment

necessary to erect circular tank covers for a water pollution control facility in Estherville, Iowa, for a total contract price of $443,000.00. Fiberglass, in turn, subcontracted with Crewmasters, Inc. ("Crewmasters") to provide labor for the installation of these tank covers. These tank covers were installed between March 1977 and November 1977.

Shortly after the work was completed, several subcontractors of Fiberglass filed liens on the project arising out of work done for Fiberglass. In order to protect itself against such lien claims, Bor-Son retained $66,191.31 pursuant to clause F of the subcontract with Fiberglass.

On March 28, 1978, Fiberglass petitioned for an arrangement under Chapter XI of the Bankruptcy Act of 1898 in the Bankruptcy Court for the District of Minnesota. On April 3, 1978, the bankruptcy court restrained every action and proceeding against Fiberglass and its property. Fiberglass notified Bor-Son of its filing in the bankruptcy court on May 18, 1978, and demanded that Bor-Son pay over the funds retained on its subcontract. Finally, on September 18, 1978, Fiberglass commenced an action in the bankruptcy court to recover the funds retained by Bor-Son.

On October 11, 1978, Bor-Son served its Answer and Counterclaim to Fiberglass' Complaint in the bankruptcy court. Bor-Son's Sixth Defense, paragraph XXVII, read as follows:

> The sum of $66,191.31, which is alleged by plaintiff in its Complaint to be due and owing, has not become a part of the bankruptcy estate and its disposition is not controlled by the Bankruptcy Act pursuant to *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), and its progeny.

Bor-Son argued throughout the proceedings, before the bankruptcy court, the United States Magistrate and the Court of

Appeals for the Eighth Circuit, that the retained funds were not the property of Fiberglass under the *Pearlman* doctrine.

On October 16, 1978, Bor-Son informed Fiberglass that unless Fiberglass satisfied the claim of Crewmasters and the other lien claimants by October 23, 1978, Bor-Son would satisfy the claims and backcharge Fiberglass' account. Receiving no response from Fiberglass, Bor-Son settled and obtained releases for all the claims and liens filed by Fiberglass' subcontractors and suppliers on November 22, 1978. Among the payments made was a payment to Crewmasters in the amount of $29,526.12.

The bankruptcy court found Bor-Son liable to Fiberglass for the amount retained by Bor-Son under the subcontract. The bankruptcy court concluded that all of the payments, except the payment to Crewmasters, benefited the debtors estate and allowed Bor-Son to deduct these payments from the retainage fund. The bankruptcy court refused, however, to allow a deduction for the payment to Crewmasters. The parties consented to have the case reviewed by a United States Magistrate and the magistrate affirmed the order of the bankruptcy court in all respects.

Bor-Son then appealed the decision to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit concluded that Bor-Son's argument that the retained funds were not Fiberglass' property required it to examine the bankruptcy court's jurisdiction to adjudicate the claim. The court found that the money retained by Bor-Son was not Fiberglass' property and that the bankruptcy court lacked jurisdiction to adjudicate the parties respective rights to the retained funds. The Eighth Circuit reversed and remanded the case to the district court with the direction to vacate the order of the bankruptcy court for lack of jurisdiction.

ARGUMENT

I. Fiberglass Has Not Presented Any Special and Important Reasons, Consistent with Rule 17, to Convince This Court to Exercise Its Discretion and Grant Fiberglass' Writ of Certiorari.

United States Supreme Court Rule 17 outlines the considerations governing review on writs of certiorari. The Rule begins by noting that a writ of certiorari is not a matter of right and will only be granted when there are "special and important reasons". Justice Frankfurter once commented that "special and important reasons" implies a "reach to a problem beyond the academic or the eposodic". *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). While a federal question raised by a writ of certiorari may present an intellectually interesting and solid problem, this Court does not sit to satisfy a scholarly interest in such issues. *Id.* The instant case does not present any special and important reasons requiring review; indeed, review would be academic in light of the new Bankruptcy Act of 1978.

A. The Question of Federal Law Decided by the Court of Appeals Under the Repealed 1898 Bankruptcy Act Is Not an Important Question Justifying Review.

Supreme Court Rule 17.1(c) provides in part that where an important question of federal law has not been, but should be, settled by this Court, the Court may grant review on writ of certiorari. Justice Harlan remarked that "the cornerstone of a petition for certiorari in a federal case is a showing that the question to be reviewed is one of *general* importance." *Manning the Dikes*, 13 Rec. N.Y.C.B.A. 541, 551 (1958) (em-

phasis in the original). The importance of an issue is not measured by its impact on the litigants, but on its contribution to the development of national law. *See* 13 Moore's *Federal Practice* ¶ 817.41, at SC17-38 (2d ed. 1982). Several commentators have noted that where the issue sought to be reviewed concerns a statute that has been repealed, absent special circumstances, the issue does not merit consideration by this Court. *See id.* at SC17-43; R. Stern & E. Gressman, *Supreme Court Practice* §4.4, at 266, 270-71 (5th ed. 1978).

Obviously, the present case falls into the category envisioned by these commentators. The Bankruptcy Act of 1898 has been repealed and replaced by the Bankruptcy Act of 1978. This case does not present an important question of federal law since it is an interpretation of a statute that does not apply to future cases. This court has consistently refused to grant writs of certiorari in such cases. *See District of Columbia v. Sweeney*, 310 U.S. 631 (1940); Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465, 466-67 (1953) (discussing *United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Furniture Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950)).

B. The Court of Appeals Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

Supreme Court Rule 17.1(a) provides in part that when a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, review on writ of certiorari may be appropriate. This provision in Rule 17 relates to the Court's supervisory capacity and allows for relief similar to that which can be obtained through a writ of mandamus. *See* 13 Moore's, *supra*, ¶ 817.27.

This provision permits the Court to grant certiorari to remedy conduct that would not merit the use of the extraordinary writ of mandamus. The cases in which the Court has granted certiorari under this provision are of a unique type unlike the present case. *See, e.g., New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979) (writ of certiorari granted to correct decision by court of appeals deciding constitutional issue before statutory issue); *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976) (writ of certiorari granted to correct remand by federal district court which had remanded case on grounds that its docket was overburdened).

C. There Is No Real or Embarrassing Conflict With Decisions of This Court, Other Federal Courts of Appeals, or the State Courts of Last Resort.

The remaining provisions in Rule 17 allow for review by writ of certiorari when a federal court of appeals' decision conflicts with either applicable decisions of this Court, decisions of a state court of last resort or decisions of other federal courts of appeals. Since state courts of last resort do not interpret federal bankruptcy laws, that reason for review cannot be present in this case.

Old Supreme Court Rule 38(5)(b) of the 1939 Rules required only a showing that the decision of the court of appeals was "probably" in conflict with applicable Supreme Court decisions. The dropping of the word "probably" indicates that a conflict with applicable Supreme Court decisions must be direct and irreconcilable. *See* R. Stern & E. Gressman, *supra*, §4.5, at 273. Petitioner Fiberglass has cited no decisions of this Court that meet this criteria.

Chief Justice Taft, in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), stated that this

Court should grant writs of certiorari only in cases where there is a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." And Justice Harlan stated that "even where a 'true' conflict may be said to exist, certiorari will sometimes be denied . . . where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, as where a statute which has given rise to conflicting interpretations has been repealed or is about to expire". *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Aust. L. J. 108 (1959); *see* R. Stern & E. Gressman, *supra*, §4.4, at 266; 13 Moore's, *supra*, ¶ 817.21, at SC17-22.

Although Petitioner Fiberglass asserts that the Eighth Circuit decision is in conflict with other decisions of the federal courts of appeal, it does not cite or discuss any such cases. Indeed, several federal courts have decided this question in accord with the decision of the Eighth Circuit. *E.g., Green v. H. E. Butt Foundation*, 217 F.2d 553 (5th Cir. 1954); *In re H. L. Gentry Construction Co.*, 200 F. Supp. 546 (E. D. Mich. 1961), *aff'd*, 314 F.2d 945 (6th Cir. 1963); *see* discussion *infra*. The only decision by a federal court that conflicts in any way whatsoever with the decision by the Eighth Circuit is *Butler v. Pacific National Insurance Co.*, 375 F.2d 518 (9th Cir. 1967). This decision, however, while reaching the conclusion that retainage on a contract with a bankrupt debtor is the debtor's property, holds that such retainage must be applied first to any lien claims, pursuant to *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962). The result of this decision is thus in accord with the decision of the Eighth Circuit and does not present the "real or embarrassing conflict" that requires review on writ of certiorari. This is particularly true in light of the fact that the Bankruptcy Act of 1898 has been repealed.

II. The Bankruptcy Court Lacked Jurisdiction to Adjudicate the Parties' Respective Rights to the Retained Funds.

A. The Decision of the Court of Appeals That the Bankruptcy Court Lacked Jurisdiction Is Consistent With Decisions by Other Federal Courts.

Petitioner Fiberglass attempts to draw a distinction between a bankruptcy court's subject matter jurisdiction and a bankruptcy court's summary jurisdiction under the Bankruptcy Act of 1898. This is a distinction without a difference in that proceedings in bankruptcy under the 1898 Act are essentially summary, as opposed to plenary, in nature. *See Willyerd v. Buildex Co.*, 463 F.2d 996, 999 (6th Cir. 1972). It is well settled under the 1898 Act that a court of bankruptcy is without jurisdiction to adjudicate a controversy in reference to property held adversely to the bankrupt estate; in such a case, resort must be had by the bankrupt's trustee in a plenary suit. *See Harrison v. Chamberlin*, 271 U.S. 191, 193 (1926). If there is a substantial dispute as to whether property is property of the debtor, then the trustee in bankruptcy must resort to a plenary action in a court that has personal jurisdiction over the adverse claimant in order to establish the property as an asset subject to the jurisdiction of the bankruptcy court. *See In re Lehigh Valley R.R.*, 458 F.2d 1041, 1044 (3rd Cir. 1972); *In re Co-Build Co.*, 408 F. Supp. 717, 720 & n.4 (E.D. Pa. 1976).

The leading case that sets forth the test for determining whether a bankruptcy court has summary jurisdiction under the 1898 Act is *Harrison v. Chamberlin*, 271 U.S. 191 (1926). That decision instructs the bankruptcy court to enter into a preliminary inquiry to determine whether an adverse claim to property is real and substantial or merely colorable. *Id.* at

194. If the bankruptcy court finds that the adverse claim is merely colorable, the court may then proceed to adjudicate the merits summarily. If, however, the bankruptcy court finds the adverse claim to be real and substantial, it must then decline to determine the merits and must dismiss the summary proceedings. *Id.*

In *In re Standard Gas & Electric Co.*, 119 F.2d 658, 661 (3rd Cir. 1941), the Third Circuit noted that in a broad sense the claim by a debtor against a third person is property of the debtor. But the court went on to say that such a claim is a species of property which may only be realized for the benefit of the debtor and its creditors by the successful prosecution of a plenary suit against the third persons involved. *Id.* at 661-62. The Third Circuit concluded that the jurisdiction which is exercised by courts of bankruptcy in summary form has uniformly been held to extend only to the person of the bankrupt and to property in his possession, *or in the possession of third persons who do not claim adversely to him or whose claims are colorable only. Id.* at 661.

At least two federal courts have directly addressed the issue of the bankruptcy court's jurisdiction over a retainage fund held by a third person adverse to the bankrupt under the Bankruptcy Act of 1898. In *Green v. H. E. Butt Foundation*, 217 F.2d 553, 554 (5th Cir. 1954), the Fifth Circuit held that a retainage fund is not a debt due to the bankrupt and does not fall into the hands of the trustee under the bankruptcy's court summary jurisdiction. The court found that liens of mechanics and materialmen, created prior to the filing of a petition in bankruptcy, appropriate the retained fund to the extent necessary to satisfy the indebtedness due such lienors. *Id.* The court stated that a trustee in bankruptcy has a right to bring a plenary action in a court of competent

jurisdiction against the third person holding the retained fund, but the trustee is not entitled to a summary order by the bankruptcy court transferring the funds to the trustee. *Id.*

The district court in *In re H. L. Gentry Construction Co.*, 200 F. Supp. 546 (E. D. Mich. 1961), *aff'd*, 314 F.2d 945 (6th Cir. 1963), also addressed the question of a bankruptcy court's jurisdiction over a retainage fund held by a third person adverse to a claim by a bankrupt under the 1898 Act. The district court held that the bankrupt contractor had no property interest in the retainage fund and that the bankruptcy court was thus deprived of summary jurisdiction. *Id.* at 550. The court relied on *Harrison v. Chamberlin*, 271 U.S. 191 (1926), for its conclusion that the bankruptcy court lacked jurisdiction to require the third party to turn over the retainage fund to the bankruptcy court. The court also held that the bankruptcy court had no jurisdiction to determine the validity of claims against a fund which is not subject to its jurisdiction. *Id.* at 552.

One federal court, however, has held that a retainage fund held by a third party is the property of the bankrupt within the meaning of the Bankruptcy Act of 1898. *See Butler v. Pacific National Insurance Co.*, 375 F.2d 518, 521 (9th Cir. 1967). Nonetheless, the court in that case, relying on *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), held that there was no right in the bankrupt's estate to the withheld funds until the lien claimants against the fund had been paid. *Id.* at 520. Thus the result is not contrary to the decision in the present case.

Consistent with the decisions in the preceding cases, the Eighth Circuit has concluded that a bankruptcy court lacks jurisdiction over a retainage fund held by a third person adverse to the bankrupt under the Bankruptcy Act of 1898.

Since the Eighth Circuit concluded that the retained money was not Fiberglass' property, it was correct in holding that the bankruptcy court lacked jurisdiction to adjudicate the parties' respective rights to the retained funds.

B. Bor-Son Did Not Waive Its Objection to the Jurisdiction of the Bankruptcy Court.

Throughout the proceedings in this case, Bor-Son consistently and strenuously argued that the retained funds were not the property of Fiberglass. Bor-Son has argued extensively that the doctrine of *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962), governs the disposition of this case and supports its claim that the retained funds were not the property of Fiberglass.

Fiberglass places heavy reliance on the decision in *In re Murray*, 94 F.2d 612 (7th Cir. 1937), for its argument that a party can waive its objections to the lack of summary jurisdiction of a bankruptcy court. The case before the Seventh Circuit in *In re Murray*, however, varies in an important respect with the present case. In *In re Murray* the third party consented to the summary jurisdiction of the bankruptcy court by voluntarily conveying the property in question to the trustee in bankruptcy after the trustee made demand for the property and prior to the adjudication by the bankruptcy court. In the present case, Bor-Son has consistently refused to pay over the retainage to the bankruptcy trustee.

CONCLUSION

Fiberglass in its Petition for Writ of Certiorari has failed to present any special and important reasons that can convince this Court to exercise its discretion and grant the writ of certiorari. In particular, there is no important question of federal law that needs to be decided by this Court in light of the repeal of the Bankruptcy Act of 1898. Nor is there any real or embarrassing conflict between the decision of the Eighth Circuit and any other federal court including this Court.

The holding by the Eighth Circuit that the bankruptcy court lacked jurisdiction is correct and in accord with other decisions by the federal courts. Further, Bor-Son never waived its objection to the summary jurisdiction of the bankruptcy court.

Respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Dated: October 18, 1982

Respectfully submitted,

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